

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1197

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1197

UNITED STATES OF AMERICA,

APPELLEE,

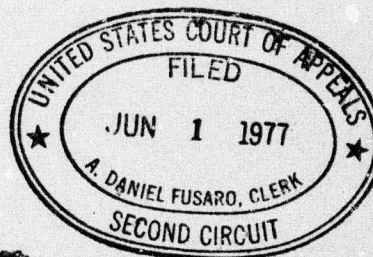
-vs-

WILLIAM EUGENE ROBINSON,

APPELLANT.

On Appeal From The United States District Court
For The District of Connecticut

BRIEF FOR APPELLANT



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STATEMENT OF THE ISSUES

- I. Whether the admission of incomplete records of the Connecticut State Labor Department violated Federal Rules of Evidence 803(7) and (10), the law of the case, and the Sixth Amendment's Confrontation Clause.
- II. Whether the failure of the trial judge to charge the jury on voluntariness pursuant to 18 U.S.C. §3501 after a sua sponte instruction on Robinson's "false exculpatory statement" constituted reversible error.
- III. Whether the prosecutor improperly injected himself into his closing summation and prejudiced appellant's right to a fair trial.
- IV. Whether the government's peremptory removal of the only black member of the venire continued a systematic practice of racial exclusion and denied the appellant a fair trial.

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,
APPELLEE,
-vs-
WILLIAM EUGENE ROBINSON,
APPELLANT.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is a direct appeal from a judgment of conviction and sentence of fifteen years' imprisonment after the third trial on an indictment charging violation of the federal bank robbery statute. On March 10, 1975, a grand jury sitting in New Haven returned a three-count indictment charging appellant, William Eugene Robinson, and David Tate with robbing the Trap Falls Branch of the Connecticut National Bank, Shelton, Connecticut, on February 18, 1975.

On June 5, 1975, with the Honorable Jon O. Newman, United States District Judge presiding, the court held evidentiary hearings on motions to suppress evidence and photographic identifications; the motions were denied.

On June 9, 1975, Tate entered a plea of guilty to the ten-year count, 18 U.S.C. §2113(b), with an understanding that the remaining two counts would be dismissed at the time of sentencing. That same day a jury was picked for Robinson's first trial.

The first trial began on June 10, 1975, and ended in a hung jury on June 13, 1975. The second trial began on January 27, 1976, and concluded on February 3, 1976, with a jury verdict of guilty on counts one and two, 18 U.S.C. §2113(a) and (b), respectively and not guilty on count three, 18 U.S.C. §2113(d). Since that date, Robinson has been incarcerated. On April 14, 1976, Judge Zampano sentenced him to fifteen years' imprisonment.

On October 29, 1976, this Court reversed William Robinson's conviction and remanded the case to the district court. See United States v. Robinson, 544 F.2d 110 (2d Cir. 1976), rehearing denied.

On February 1, 1977, jury selection began before the Honorable T. Emmet Clarie, Chief Judge, in Hartford at which time the prosecutor peremptorily struck the only black venireman in the panel. On February 9, 1977, the government began its presentation of evidence in the third trial, and on

February 15, 1977, the jury returned verdicts of guilty on counts one and two of the indictment.

On February 21, 1977, William Robinson filed a motion for a new trial on the ground that the government's peremptory challenge of the only black member of the venire was part of a continuing pattern of systematic exclusion in the Hartford seat of court.

On March 21, 1977, Judge Clarie denied the motion for new trial and sentenced William Robinson to fifteen years' imprisonment and denied him bond pending appeal. On May 24, 1977, this Court re anded the bail question to the district court for a more particular statement of reasons for the denial of bail.

A timely notice of appeal has been filed and William Robinson remains incarcerated at the Connecticut Correctional Center, Bridgeport, Connecticut, where he has assisted his counsel in the preparation of this appeal. Fed.R.Crim.P. 38(a)(2).

Since there is a lengthy history to this case, we shall set forth in detail the proceedings leading up to the third trial.

June 5, 1975, Pretrial Identification Hearing.

Evidentiary hearings out of the jury's presence on the identification issue were held on June 5, 1975. Prior to the commencement of the hearing, a show-up occurred outside of

Judge Newman's courtroom. Bank teller Retta Mondulick related that the defendant, William Robinson, came out of the elevator, and she said she immediately recognized him. She testified that she was sitting some forty feet away from the elevator, but when the defendant stepped out, she knew instantly that he was the man who stood across the counter from her during the robbery. She testified that she was feeling paranoid the day of the hearing and that there were no other black people in the hallway at the time the defendant came off the elevator.

The other teller, Robert Welch, testified that he heard Mrs. Mondulick say, "Oh, my God, he's here" and saw her burst into tears before he saw the defendant in the hallway outside the courtroom. He testified that he saw the defendant for a split second only and then only in profile as the defendant was entering the courtroom. Notwithstanding this fleeting opportunity, he testified he was able to make an absolutely positive identification.

Robinson testified that when he came out of the elevator, he saw special agent Clarence Smith standing in the hallway pointing at him and saying, "Look, he's here." Smith confirmed much of Robinson's testimony, saying only that his comment, "Look, he's here" was in a low tone of voice which neither Welch nor Mondulick could have heard.

The First Trial.

During the first trial, the government's case relied on the eyewitness testimony of the two tellers. Both made in-court identifications of the defendant as one of the participants in the robbery. In addition, the government introduced blown-up photographs of bank surveillance film and Robinson's leather coat claiming it was the coat worn by one of the robbers in the photographs. Officer John Bowens of the Bridgeport Police Department also testified for the government, claiming that he had known Robinson for many years in the streets, that he had seen Robinson wearing hats similar to the one worn by the bank robber, and that, to him, the man in the bank surveillance photograph looked like William Robinson. The government introduced no fingerprint reports, no bait money, no wrappers, no weapons--none of the tangible evidence that is often present in bank robbery prosecutions.

The defense showed the jury the entire film of the robbery with projector and screen. The defense contention was that careful study of the film would reveal that Robinson was not one of the robbers, that Robert Welch had not once looked at the man across the counter who held a gun on him, that the man across the counter had put his palm down on the counter and that the robbery lasted only 84 seconds--contrary to the testimony of the tellers who claimed it lasted as long as six or seven minutes.

Cross-examination of agent Smith revealed that fingerprints and palm prints had been found on the counter at the spot touched by the bank robber but none of those prints matched Robinson's. Smith revealed further that the tellers described the robber's height to the F.B.I. as being 5'10" while Robinson is 6'3" tall. Smith also admitted that a Bridgeport correctional officer, George Maher, had identified the robber as one Eli Turner, rather than Robinson.

Kenneth Wilson testified that he had known Robinson for almost nine years, and that to him, the person in the bank surveillance photo did not look like Robinson because the features were different.

Joseph Burroughs testified that on February 18, 1975, he had been working for the defendant as a numbers runner. Burroughs testified that he had left the defendant at their "Smoke Shop" at 12:30 to go cash his unemployment check and that when he returned to the "Smoke Shop" at 1:45, Robinson was still there. Burroughs testified he remembered the date because it was the day of his last unemployment check, and he always picked up his unemployment check on a Tuesday.

The defendant testified in his own behalf, confirming Burroughs' alibi and adding that the following day he had driven to Pennsylvania in a borrowed car where he held a job with Carolina Freight as a driver. Robinson testified that he drove trucks for the next ten days until he learned from his wife that the police were looking for him. He then returned to Bridgeport and presented himself to the police to find out

why they were searching for him. At that point, he was arrested by the F.B.I.

David James Tate.

David Tate was permitted to plead guilty to the ten-year count on June 9, 1975. Tate refused to testify for the government at the first trial of William Robinson. On September 9, 1975, Tate was sentenced to the maximum, ten years. On September 18, 1975, Tate was subpoenaed before a grand jury in Hartford where he was immunized and ultimately found in contempt for refusing to testify and sentenced to imprisonment for the life of the grand jury by Judge Clarie. The sentence was to interrupt his ten-year sentence.

On January 26, 1976, Tate agreed to testify for the government on the following conditions: (1) the government would not oppose his motion for reduction of sentence which was pending before Judge Zampano; (2) his contempt sentence would be vacated; (3) he would not be placed in the same institution as Robinson; and (4) the full extent of his cooperation would be brought to the attention of the Parole Board.

The Second Trial.

The primary differences between the first and second trials, from the government's standpoint, were Tate's testimony and that of Walter Glennon rebutting Burroughs' alibi for

Robinson. Glennon, the manager of the unemployment compensation office in New Haven, testified that records from the State Labor Department (no cancelled checks or vouchers) revealed that Burroughs' last payment was on February 10, not on February 18, and that Burroughs had not received any payment on February 18, 1975.

With respect to the defense case in the second trial, all testimony concerning George Maher's identification of the man in the surveillance photo as Eli Turner, a former inmate of the Bridgeport jail wanted for armed robbery, was excluded.

The Reversal of the Conviction after the Second Trial.

Robinson's conviction was reversed on October 29, 1976, because of two evidentiary rulings of the district court: (1) the exclusion of the Maher-Fabrizzi testimony; and (2) the admission of Glennon's testimony concerning the Labor Department records of Joseph Burroughs, which prejudiced Robinson's defense. United States v. Robinson, 544 F.2d 110 (2d Cir. 1976).

STATEMENT OF FACTS

On Tuesday, February 18, 1975, at approximately 1:50 p.m., three black males robbed the Trap Falls Branch of the Connecticut National Bank, Shelton, Connecticut. Approximately \$2,034 was taken. Two of the robbers carried handguns; the third carried a shoulder weapon. Only one robber wore a mask--a wool knit ski cap pulled down over his face. None of the robbers wore gloves. According to the film taken by the bank surveillance camera, the bank robbers spent a total of 84 seconds inside the bank.¹

Two tellers, Retta Mondulick and Robert Welch, were in the bank at the time of the robbery. Neither teller was black. They provided the F.B.I. and Shelton Police with general descriptions of the participants in the robbery and indicated that the getaway car was a 1972 or 1973 shiny black Cadillac.

The film was immediately taken by the F.B.I. and developed. Certain pictures which seemed clearer than others on the film strip were blown up and reprinted. A large number of copies were made and circulated throughout the Bridgeport area by F.B.I. agents and Bridgeport Police Officers.

1. Mrs. Mondulick testified that as the first man entered the bank, she was so suspicious she pushed the alarm immediately, even though the robbery had not yet started. The alarm triggers the surveillance camera so that the film speeds up to a rate of one frame per second. By counting the frames it was possible to determine how long the robbers were in the bank.

The counter area of the bank, touched by two of the robbers, was dusted for fingerprints along with other areas of the bank. Fingerprints were found on the counters in the areas touched by the bank robbers and on the sign of one of the tellers, which had been knocked off the counter by one of the robbers in the course of the robbery. None of the prints were those of appellant Robinson.

As a result of an unidentified informant's identification of the defendant in one of the bank surveillance photos, the F.B.I. obtained an arrest warrant from Magistrate Moore in Bridgeport on February 24, 1975. On February 25, 1975, at approximately 9:00 a.m., special agent Smith in the company of four other agents of the F.B.I. and two Bridgeport Policemen went to the Robinson apartment. When they knocked on the door and received no response, they obtained a master key which did not work and then obtained a sledge hammer and broke into the apartment. That same day the agents returned to the apartment and were invited in by Mrs. Robinson. They asked if she would have any objection to their looking around, and she permitted them to do so. In the course of the search, one of the agents discovered a dark brown simulated leather coat hanging in the closet. To the agents, the coat resembled the coat worn by one of the robbers. The bank surveillance photograph showed the coat as having certain folds in both the left and right lapels. To the agents the coat had the same or similar folds. Mrs. Robinson said the coat was her husband's and in response to the agents' request told them they could take it.

On Friday, February 28, 1975, the defendant presented himself at the Bridgeport Police Station and inquired why the police had broken down his door and searched his apartment in his absence. The police knew nothing of the episode and contacted the F.B.I., who then came over to the police station and arrested Robinson for bank robbery.

At that time, the F.B.I. took a full set of major case prints and photographed the defendant. Special agent Smith then questioned Robinson concerning the bank robbery and showed Robinson a bank surveillance photo of the three robbers. Smith testified that Robinson pointed to one of the robbers and said, "That's Tate." Robinson denied saying "That's Tate" when he took the witness stand. According to Smith, Robinson advised Smith that on February 18, 1975, he was at a place on Reservoir Avenue in Bridgeport and also in the area of East Main Street and Stratford Avenue. Smith never investigated Robinson's statement.

On March 4, 1975, Smith took a spread of photos, including one of the defendant, to show to Robert Welch. Robinson's picture was number eight in a nine photo spread. Welch went through the pictures and stopped at number five. He told Smith the picture "resembled" the bank robber who had been directly across the counter from him. Smith told Welch to look through all of the pictures before making up his mind. When Welch came to Robinson's picture, he stated that the eyes, nose and hair looked like those of the man across the counter.

Smith asked Welch, "Do you think that's him?" Welch answered, "I can't be positive, but I'm almost positive." Welch turned the picture over, initialed the back and wrote, "man at counter" on the back.

Two days later special agent Paul McEvoy went to the bank, where he showed the same spread to Retta Mondulick. The same picture which had been initialed and identified by Welch was in the spread. Like Welch before her, Mondulick hesitated at one of the other pictures but ultimately selected the picture of William Robinson as the man who had been across the counter during the bank robbery. Mondulick then put her initials and the words "man at counter" on the back of the picture, noticing in the process that Bob Welch had also selected that photograph. As they had done at the first and second trials, and outside the courtroom on June 5, 1975, prior to a suppression hearing, Welch and Mondulick identified Robinson in the courtroom as one of the robbers.

David Tate, whose sentence had been reduced from ten to six years by Judge Zampano after his testimony in the second trial and who expects to be paroled in July, 1977, testified against Robinson at the third trial as he had done at the second trial. Tate was a heroin addict and had been convicted of four felonies prior to his plea of guilty to the bank robbery charge. Tate testified that he, Luther Fleming, who has never been indicted by a grand jury or prosecuted for his participation, and Robinson committed the bank robbery.

The Defense.

During the third trial, the defense called George Maher, a corrections officer at the Bridgeport Correctional Center, who testified that on February 19, 1975, an F.B.I. agent exhibited to him a bank surveillance photo which was circulated among the other officers. It was the opinion of two of the officers that the photo resembled an ex-inmate by the name of Eli Turner. T. 332.

Edmund Gabrys, a sergeant with the Bridgeport Police, testified that on February 18, 1975, he was obtaining warrants of arrest for Turner for two robberies in Bridgeport that took place on February 12 and 13, 1975. He described Turner as six feet one inch, two hundred pounds and as a black man. T. 335-6.

Eli Turner was called to the stand. Turner denied being involved in the bank robbery and testified, when pressed by the prosecutor, that the man who was supposed to be Robinson was a "dope fiend" he had seen around Bridgeport. T. 380. Turner knew Robinson since he had a common law relationship with Robinson's wife's sister. Turner recalled February 18, 1975, by stating that he remained inside his apartment taking drugs the entire day, because he was hiding from the police. Turner had been convicted subsequently of the robberies and had an extensive criminal history.

Arthur F. Sweeney then testified that in January of 1976, he was incarcerated at the Whalley Avenue jail in New Haven and

overheard a conversation between David Tate and Hilton Payne.² Sweeney testified that he heard Tate talk about setting somebody up for a bank robbery charge. Sweeney stated that Tate said "My testimony alone won't convict him, I'm going to testify, but I need some help, you know." T. 397. Tate asked Payne if he'd cooperate and say that Willie Robinson was planning a big job. Payne then told Sweeney that they were setting up Willie Robinson for a bank robbery conviction. Tate also said that he had come up from a federal penitentiary down south and he already got or was about to receive a reduction in sentence. Sweeney heard Tate tell Payne,

Don't worry about lying, because the
federal officials will cover your back,
and you might get something out of it,
too. (T. 397)

The defendant, William Robinson, then testified as he had in two previous trials that he was not involved in the bank robbery. At the time of the robbery, he was at Ernie's Smoke Shop on the corner of East Main Street and Stratford Avenue in Bridgeport, where he ran a numbers operation with Joseph Burroughs. The defendant further testified to how he had learned from his wife that the police were after him and about his return to Bridgeport and appearance at the Bridgeport Police Station to straighten out any problem that may have existed.

Joseph Burroughs testified, as he had in the first and second trials, that William Robinson was at the "Smoke Shop"

2. Payne never testified at either the second or third trials, although the government had produced him at the second trial by writ of habeas corpus ad testificandum.

on the day of the robbery. Burroughs recalled the date because he had gone to the unemployment office on February 18, 1975, to pick up his unemployment check. Burroughs had been Robinson's numbers runner, and Robinson had to remain at the "Smoke Shop" while Burroughs picked up his check because of their business. Because Tate had testified that Robinson had approached him at approximately 9:00 a.m. with an offer to make some "big money," T. 170-71, and further testified that he, Robinson and Fleming remained together in Fleming's Cadillac from that time through the time of the bank robbery, which occurred at 1:50 p.m.,³ Burroughs' testimony was crucial since his meeting with Robinson between 12:00 p.m. and 1:00 p.m. was inconsistent with the government's theory and Tate's testimony of what had happened that day.

In rebuttal, the government called William Kegler, an employee of the State Department of Labor, who brought certain records to court which did not contain an entry that Joe Burroughs had gone to the Bridgeport Unemployment Office on the day of the robbery.

3. Tate testified that he, Robinson, and Fleming, rode around Bridgeport and then cased a bank in Southport prior to going to Shelton, where Tate said they all participated in the robbery. T. 171-74. After the bank robbery, Tate testified that the three participants drove to Fleming's apartment in Bridgeport where they counted and divided the money.

ARGUMENT

I. THE ADMISSION OF INCOMPLETE RECORDS OF THE CONNECTICUT STATE LABOR DEPARTMENT VIOLATED FEDERAL RULES OF EVIDENCE 803 (7) and (10), THE LAW OF THE CASE, AND THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

At the outset, it should be noted that the admission of Labor Department records to rebut the testimony of Robinson's sole alibi witness, Joseph Burroughs, was considered error by this Court in reversing Robinson's conviction upon his second trial. United States v. Robinson, 544 F.2d 110 (2d Cir. 1976). Joseph Burroughs testified, as he had at the first and second trials, that on February 18, 1975, the day of the robbery, Willie Robinson arrived at "Ernie's Smoke Shop" between noon and 1:00 p.m. T. 520. At that time, Joseph Burroughs left Robinson and went to the unemployment office on Washington Avenue in Bridgeport. After picking up his check, Burroughs went to the bank and returned to the shop before 3:00 p.m. Willie Robinson was still there. This testimony corroborated that of Robinson, who testified that he had been at the "Smoke Shop" in Bridgeport that entire afternoon and had not been involved in any way in a bank robbery. T. 415-498. Burroughs was able to recall the date because he had gone to the unemployment office and picked up a check on the 18th of February. To rebut Burroughs' testimony, the government offered the testimony of William

Kegler, who was employed by the Connecticut State Labor Department, and certain department records which were obtained from microfilm. The records that Kegler brought to court did not contain a record or entry that Joseph Burroughs had picked up an unemployment check on February 18, 1975. Because the records Kegler brought with him were incomplete and therefore unreliable and untrustworthy, their admission violated Fed. R. Evid. 803(7) and (10), this Court's prior decision, which is the "law of the case" (see United States v. Fernandez, 506 F.2d 1200 (2d Cir. 1974)), and the Confrontation Clause of the Sixth Amendment.

A. Admission of the Incomplete Labor Department Records Violated Rules 803(7) and (10) and the Law of this Case.

Since Kegler's records and entries did not affirmatively state that Burroughs had not received a check on the date of the robbery, the jury was asked to draw the negative inference that no payment had been made. As Judge Meskill found previously, "the records merely indicated that checks had been received by Burroughs on certain dates and the date of the bank robbery was not one of them." 544 F.2d at 114.

Fed. R. Evid. 803(10) "creates an exception to the hearsay rule, even though the declarant is available as a witness":

(10) Absence of public record or entry. To prove the ... nonoccurrence ... of a matter of which a record ... was regularly made and preserved ... evidence in the form of a certification

in accordance with Rule 902 [self-authentication], or testimony, that diligent search failed to disclose the records ... [or entry].

Id. at 114 (ellipses original). Fed. R. Evid. 803 (7) provides a hearsay exception for:

Evidence that a matter is not included in the ... records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a ... record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

After objection to the government's offer, Kegler testified on voir dire that on February 18, 1975, his office was in Wethersfield and he had no first-hand knowledge of what happened in Bridgeport. T. 561-62. He began his search by going to the computer-ledger card, which is a summary, and then to microfilm and photocopied the records "that were there." T. 562. Kegler explained that for the calendar year 1975:

... since this was at the height [sic] of our recession in Connecticut, our Department was somewhat confused in record keeping, beyond payments made to individuals. In other words, we were paying, let's say, thousands of checks per day, over and above what our equipment and staff would allow, and complete processing. Consequently well, I suppose figuratively speaking, tons of these records on which payments had been made were literally piled in forms awaiting further processing [in Bridgeport].

In that respect, the records were not available. I don't know if you call that a confused situation. I guess in some ways it could be.

T. 563-64. Kegler could not say whether anybody had ever gone to those rooms and conducted a physical search for the actual records. T. 564-66. Kegler pulled the ledger cards in Wethersfield and assigned an assistant, Alice Romano, to search the film library. T. 569. Kegler further testified that he could not find certain other documents that should have existed. These other documents consisted of a voucher known as a UC 46 which a claimant signs when he picks up his check and a check dated February 8, 1975, in the amount of \$122 which Kegler claimed had been respectively signed by and issued to Burroughs. T. 571-73. Kegler testified that the February 8 check and corresponding UC 46 (date unknown) were missing, T. 574, and therefore, the records were incomplete.

The significance of the missing February 8 check and voucher is as follows. When a person goes to the unemployment compensation office, he must sign and date the UC 46 when he receives his check. Because of the absence of the check and the UC 46, the records fail to show that Burroughs did not pick up the February 8 check on February 18 as he had testified. February 18, 1975, was the Tuesday which followed Washington's Birthday which was celebrated in Connecticut on the 17th. It is entirely possible that Burroughs picked up the check a week later than he normally did. Instead of picking up the February 8 check on the 10th, he may have picked up the check

a week later. Production of the February 8 cancelled check and/or the voucher signed by Burroughs would have answered this question. Without production of these two documents which bear directly upon whether Joseph Burroughs went to the unemployment office on the day of the robbery, the records were as unreliable and untrustworthy as this Court found them to be at the second trial. A cancelled check or voucher which could establish the validity or invalidity of Burroughs' crucial testimony, may have been buried in the stacks of documents described by Kegler when paper was being generated "over and above what our equipment and staff would allow." T. 563-64. The ledger's notation that the check was picked up on February 10, is of little help. The same record was introduced and relied on in the prior trial and held by this Court to be insufficient to meet the threshold requirements of the Rule. Further, Burroughs was eligible to receive a check on February 18 since, as Kegler admitted, it was during the period of Burroughs' additional thirteen-week extension. T. 617. Therefore even assuming (without conceding) the accuracy of the ledger (with no supporting documents) which has a notation that Burroughs picked up a check on February 10, 1975, Burroughs could have picked up another check on February 18, 1975, because he was eligible under the thirteen-week extension.

It is apparent that the absence of an entry or record showing payment and receipt of Joseph Burroughs on the day of the robbery easily could have been the result of the Department of Labor's own inability to handle the mountain of

paper work which existed in 1975 as described by Kegler. The search was not "diligent" under Rule 803(10) and the records presented formed an insufficient basis for the drawing of the negative inference which undermined the credibility of Robinson's only alibi witness.

In addition to the issue of trustworthiness of records which must be resolved against the government, it should be noted that the manner in which the Department of Labor made and kept these records was far from regular in 1975 according to Kegler's chaotic description, supra. It was therefore clear that the records lacked a firm foundation for admissibility, because the irregularity of their making and storage rendered their accuracy highly suspect rather than merely or highly probable. See United States v. DeGeorgia, 420 F.2d 889, 894-95 (9th Cir. 1969)(Ely, J., concurring).

It is respectfully submitted that the admission of the labor department's records violated Rules 803(7) and (10) and this Court's prior ruling in United States v. Robinson.

B. The Confrontation Clause.

Under the facts of this case, the admission of the labor department records also denied Robinson his Sixth Amendment right to cross-examine secured by the Confrontation Clause. "[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses

against him." Pointer v. Texas, 380 U.S. 400, 404 (1965); Bruton v. United States, 391 U.S. 123, 126 (1968). "The reason for excluding [hearsay] as an evidentiary matter also requires its exclusion as a constitutional matter." Bruton, supra, at 136 n.12. Because the records were unreliable and untrustworthy and therefore inadmissible under Rule 803, they constitute total hearsay, Rules 801(c), 802, and the appellant was left with nothing but Kegler's unsupported claim that some records he could not find were missing while others he could not find were never made. If reliability and trustworthiness are the premises for the admission of "public or business" records, see Palmer v. Hoffman, 318 U.S. 109 (1943), then the admission of these records was constitutional and prejudicial error. This conviction should be reversed.

II. THE FAILURE OF THE TRIAL JUDGE TO
CHARGE THE JURY ON VOLUNTARINESS
PURSUANT TO 18 U.S.C. §3501 AFTER
A SUA SPONTE INSTRUCTION ON ROBINSON'S
"FALSE EXCULPATORY STATEMENT" CON-
STITUTED REVERSIBLE ERROR.

At the time Robinson was arrested by the F.B.I. on February 28, 1975, he was taken to the F.B.I. office in Bridgeport by Clarence Smith and other agents. The government offered Smith's testimony concerning his interview of Robinson on that date for two purposes. First, Smith testified that after he showed Robinson a bank surveillance photo of the robbery, Robinson stated, "That's Tate," T. 249-50, which the government of course, offered for its truth. Second, Smith testified that when he showed Robinson the coat he had previously seized from Robinson's apartment on February 25, Robinson stated, "That's my coat," T. 247-48, which statement was also offered for its truth. On cross-examination, Smith testified that during the interview, Robinson also told Smith, in response to Smith's questioning, that on February 18, the day of the robbery, he was in the area of the intersection of East Main Street and Stratford Avenue in Bridgeport⁴ and also at an establishment on Reservoir Avenue in Bridgeport. T. 284-88. Smith admitted that he never checked out the information Robinson had given him. Id.

4. Ernie's Smoke Shop, where Robinson took numbers, is located on this corner.

The government never requested a "false exculpatory statement" charge simply because it was asking the jury to believe that Robinson's statements to Smith showed knowledge of the bank robbery and were therefore inculpatory. Nonetheless, Judge Clarie charged:

When a defendant voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the jury.

T. App. 661. Exception was taken to the charge. T. App. 667. The trial judge gave the jury no explicit guidance concerning what part of Robinson's statement to Smith they should focus upon in deciding whether to draw the inference that Robinson was lying to Smith and therefore had a guilty conscience. Clearly, however, he was referring to Robinson's statement that he was in Bridgeport and not in Shelton where the bank was robbed on February 18, 1975. It should be noted that Robinson's statement concerning his whereabouts was consistent

with his own testimony during three trials as well as the testimony of Burroughs, his alibi witness.

The issue presented in this appeal is whether Judge Clarie was required by 18 U.S.C. §3501 and United States v. Barry, 518 F.2d 342 (2d Cir. 1975), to follow his "false exculpatory statement" instruction with an instruction that in considering the voluntariness of the statement, "the jury [should] give the statement such weight as the jury feels it deserves under all the circumstances." 18 U.S.C. §3501(a), United States v. Barry, *supra*. While defense counsel did not request the voluntariness charge, the defense had no idea or warning that the trial judge was going to give the false exculpatory statement charge and thereby explicitly raise the issue of voluntariness.⁵ The trial judge gave the jury no hint that the voluntariness of Robinson's statement was an issue for them to consider. His charge was not even phrased in the conditional, "if you find the defendant voluntarily offers a statement." Judge Clarie's words were:

When a defendant voluntarily offers
an explanation

* * *

It is reasonable to infer that an
innocent person does not ordinarily
find it necessary to invent or

5. This is not a case like United States v. Diop, 546 F.2d 484 (2d Cir. 1976), where the issue of voluntariness was not raised, since the trial judge himself expressly raised the issue of voluntariness without full and complete instructions.

fabricate a voluntary explanation.

* * *

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt

His instruction, so devastating in its effect upon a defendant, assumes the voluntariness of the "innocent explanation."

Before a jury should be allowed to infer that a defendant, under arrest and in the custody of the F.B.I. in the confines of its office, has a guilty conscience as manifested by a false exculpatory statement, that jury must be instructed that they should consider whether such a statement was the product of duress, coercion or fear. This Circuit has found that Congress "unmistakably intended" that "the jury play a part in weighing the evidence of duress." United States v. Barry, supra, 518 F.2d at 347. The fact that Robinson's statement of his whereabouts was exculpatory does not relieve the trial judge of his obligation to give a section 3501(a) instruction, since the trial judge had already informed the jury that they can consider the statement as circumstantial evidence of a consciousness of guilt. There seems to be no logical reason for dispensing with the voluntariness charge when a defendant makes an exculpatory statement; indeed, the defendant in Barry denied making the statements at all. Id. at 346-47.

The failure to give the §3501 charge is prejudicial and

reversible error. Since the charge is specifically mandated by Congress, the failure to give the charge must be tested against a higher standard of harmless error. United States v. Barry, supra, 518 F.2d at 348, citing Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

Had Robinson's counsel known that the false exculpatory statement charge was going to be given, he would have had the opportunity to request the voluntariness charge as mandated by 18 U.S.C. §3501. Counsel also would have been able to present the issue of voluntariness in his argument. During the colloquy between counsel and the court concerning Robinson's requested jury instructions, the trial judge never advised counsel for either side that he intended to give a false exculpatory statement charge. Judge Clarie's failure to advise counsel of his intentions violated the spirit of Rule 30 of the Federal Rules of Criminal Procedure. Either the false exculpatory statement charge should have been omitted or the §3501 voluntariness charge should have been given. Furthermore, since Robinson's in-court testimony, as well as the testimony of Joseph Burroughs, was consistent with his February 28 statement, and Judge Clarie failed to specify which explanation, in or out of court, he was referring to in his charge, the jury could have been led to believe that if they disbelieved Robinson's in-court testimony they could draw an inference of consciousness of guilt, there was further prejudice to the defendant. The appellant has found no case which approves

the applicability of the "false exculpatory statement" charge to in-court testimony.

The trial judge's charge violated 18 U.S.C. §3501 and constituted prejudicial and reversible error.

III. THE PROSECUTOR IMPROPERLY INJECTED HIMSELF INTO HIS CLOSING SUMMATION AND PREJUDICED APPELLANT'S RIGHT TO A FAIR TRIAL.

In his rebuttal argument, the Assistant United States Attorney felt compelled to bolster the credibility of the accomplice, David Tate. He set the stage as follows:

All right, look at David Tate. We readily concede that David Tate is not a nice fellow. He's a drug addict; been convicted of four felonies, and now a bank robbery. The government never told David Tate 'we want you to identify Robinson so you can get some benefits for yourself.' The government told Tate 'we want to know who did the bank robbery with you.'

And Tate finally came forward and he said it was Robinson ... he didn't pick a name out of the hat; he picked the name of the man he was with on February 18, 1975, the defendant, Willie Robinson.

Then the prosecutor injected his own integrity into the issue of Tate's credibility.

Tate hadn't been released--I don't know if he will be released. The government made a deal with Tate, but ladies and gentlemen, if you are concerned that the government has made a deal with Tate, be concerned with me. I made the deal. It is my responsibility.

App. 24-25. Prompt objection was made to the argument, and while the trial judge instructed the jury to "disregard it," the damage had already been done. Tate, a man who had pleaded guilty to the bank robbery, was pointing his finger

at Robinson. Tate was a heroin addict and a four-time convicted felon. His credibility was a key issue in the case. Without Tate, the government had failed to convict Robinson on the first trial.

Apart from vouching for Tate's credibility and injecting his own integrity as an issue, which practices have been condemned by this Court in United States v. Burse, 531 F.2d 1151 (2d Cir. 1976), the prosecutor, by his agreement, was attempting to remove the issue of Tate's credibility from the jury. By arguing that the deal with Tate was his responsibility, the prosecutor was telling the jury not to be concerned with a motive that Tate may have had to falsely implicate Robinson.

Three defense witnesses, Robinson, Burroughs, and Arthur Sweeney, cast doubt upon Tate's credibility. The jury had heard Sweeney's account of Tate's conversation with Hilton Payne, an inmate at the Whalley Avenue jail, which took place in January, 1976, just prior to Tate's testimony at the second trial. Sweeney testified that he heard Tate tell Payne that he needed help to convict Robinson, that Tate told Payne that he was going to get a reduction in sentence and not to worry about lying because the federal officials would "cover your back," and further that it was a "set up." Tate also asked Payne if he'd corroborate and say that Willie Robinson was planning a big job. T. 396-97.

The evaluation of Tate's motivation and credibility was

the jury's responsibility, not the prosecutor's, once he had already decided to use David Tate as a witness against Robinson. By arguing that Tate's deal was his responsibility, the prosecutor effectively removed the issue of wrongful motive and credibility from the jury, thereby denying Robinson a fair trial. The trial judge's instruction could not remove the erroneous impression, left by the prosecutor's improper injection of his own integrity, that Tate's credibility was not an issue for the jury to consider.

The summation violated permissible standards of fair argument as set forth in Burse, supra, and constituted reversible error.

IV. THE GOVERNMENT'S PEREMPTORY REMOVAL
OF THE ONLY BLACK MEMBER OF THE VENIRE
CONTINUED A SYSTEMATIC PRACTICE OF RACIAL
EXCLUSION AND DENIED THE APPELLANT A
FAIR TRIAL.

The jury which decided this case was selected and sworn in Hartford, Connecticut on February 1, 1977. Just seven days earlier, in a case of which all counsel and the trial court were acutely aware, cf. App. 19-20, this Court issued a writ of mandamus upholding the government's use of peremptory challenges to remove qualified black veniremen in the New Haven, Connecticut, seat of court. United States v. Newman, 549 F.2d 240 (2d Cir. 1977). In that opinion, the Court contrasted what it found to be an acceptable pattern of challenges in New Haven to that which was shown with respect to Hartford. Id. at 245. Yet in this case, the first to be tried in Hartford after Newman, the government employed one of its peremptory challenges to remove the only black person on a 49-member venire and 28-member panel. Before sentencing, the defendant's motion for a new trial on this ground was denied. App. 59-61.

In Newman, Judge Anderson noted that:

Comparing the 68% expected rate
[of appearance of at least one black
member on criminal juries selected
from biracial panels] ..., it is
abundantly clear that the rate
experienced in the Hartford Division
falls far below the standard....

* * *

... Out of 47 trials [during the 1974-76 study period] in the Hartford Division, 23 final panels had an average of 2 blacks per panel. Of those 23 trials, only 4 had a Black on the jury. Taking into account the district court's 'expected' rate of 68%, Blacks should have appeared on 15 juries.

549 F.2d at 245 (emphasis original). Thus, instead of 68%, this Court found that only 17% of the juries selected in Hartford from qualified interracial panels had even one black member. ⁶ Id. Faced with this disparity in black participation, attributable solely to the exercise of peremptory challenges, this conviction cannot stand. The appellant is himself a black man, yet in the face of warnings from this Court and others based on proven statistical patterns, the prosecutor intentionally eliminated the only black person available for jury service.

Under the Jury Selection and Service Act of 1968, as amended:

[N]o [otherwise qualified] person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, that any person summoned for jury service may be ... (3) excluded upon peremptory challenge as provided by law

6. In its memorandum in opposition to defendant's motion for new trial, the government sought to bring these figures up to date, pointing out that during the six months since compilation of the Newman figures, there had been 12 juries (in addition to this one) empanelled in Hartford; eight of these venires produced interracial final panels; and five of the juries had at least one black member. Even including these figures, however, the percentage of interracial juries selected from interracial panels was only 29%, or 28% if the facts of the instant case are included, rather than the expected 68%.

28 U.S.C. §1866(c)(emphasis added); see also id. §1862 ("No citizen shall be excluded . . . on account of race, color . . ."). Thus, the Jury Act authorizes peremptory challenges of any "person", but not of a "class of persons," and certainly not "on account of race [or] color." Under the statistical showing of a two-year practice in the Hartford seat of court, and given the exclusion of the only available black juror in this case, the defendant was entitled to relief. See Newman, supra; United States v. Nelson, 529 F.2d 40, 43 (8th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Carlton, 456 F.2d 207 (5th Cir. 1972); United States v. Pearson, 448 F.2d 1207, 1213-18 (5th Cir. 1971); United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974).

At the time the challenges were exercised, the prosecutor was either unable or unwilling to give a nonracial reason for eliminating the only black panel member. App. 19-20. Later, in his memorandum opposing a new trial, the prosecutor intimated that he had such a reason: namely, that the panelist had been a member of a jury the previous month which voted to acquit a certain defendant. In argument on the post-trial motion, the prosecutor flatly stated that this was his reason. App. 60. This Court may take notice from official court records, however, that the government did not challenge a white member of the same prior jury, one Brouillard (Juror #9), who also appeared on the final panel and was ultimately seated in this case.

App. 15-17, 18. Moreover, it must be seriously doubted whether the government may lawfully seek to exclude from further jury service those persons who have shown a willingness to acquit in appropriate cases. In a District such as Connecticut, where the same veniremen appear repeatedly for service over a period of many months, the tendency of allowing such a practice would be toward juries "organized to convict" and therefore impermissible under the Sixth Amendment. Witherspoon v. Illinois, 391 U.S. 510, 521 (1968), quoting Fay v. New York, 332 U.S. 261, 294 (1947). The Witherspoon doctrine requires reversal even where not all, but only one potential juror is improperly eliminated. Davis v. Georgia, 97 S.Ct. 399 (Dec. 6, 1976).

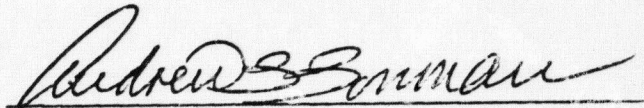
In the face of an implicit warning from this Court and in view of the dubious justification finally proffered, the government's peremptory elimination of the only potential black juror deprived the appellant, a black man, of a fair trial by a fairly selected jury. The conviction must be reversed.

CONCLUSION

For all of the reasons set forth in this brief and in view of the government's failure to prove its case by competent and admissible evidence against William Robinson after three trials in which appellant has consistently maintained his innocence, the judgment of conviction should be reversed and the indictment should be dismissed.

Alternatively, for all the reasons set forth in the brief, the judgment of conviction should be reversed and a new trial ordered.

Respectfully submitted,



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Dated: May 31, 1977

Also on Brief:

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CERTIFICATION

I hereby certify that two copies of the foregoing Brief and Appendix for Appellant William Robinson, have been mailed to H. James Pickerstein, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 31st day of May, 1977.

